CORONAVIRUS; POLITICS; CONTRACTS

The advent of coronavirus has reminded attorneys and their clients that there are limits to the practical effectiveness of agreements, particularly when concluded on a cross-border basis. These limits include performance risk and political risk, both of which may interrelate and may be exacerbated by conflicts of law and enforcement of judgments issues.

For example, last week, there was significant chatter about whether Chinese counterparties can escape their obligations under non-Chinese law contracts on the basis that Coronavirus has resulted in circumstances constituting a force majeure. Apparently, Chinese counterparties may seek to rely on a certificate issued by the Chinese government which establishes for evidentiary purposes under Chinese law that a force majeure event has occurred. Some articles venture to determine whether that certificate would be effective to establish a force majeure for non-Chinese law purposes; the answer seems to be "probably not."

Choosing the law of a jurisdiction where one has reasonable confidence in the rule of law to govern one's contracts is understandable. What is more, one's position strengthens if that choice also leads to one's having the homecourt advantage. One should not forget, however, that the counterparty might agree to a foreign choice of law and venue because that counterparty expects to rely on its homecourt advantage to frustrate enforcement of a judgment that it does not like.

So, what does one do when an obligor in a cross-border transaction, irrespective of nationality, invokes Coronavirus, or some other natural disaster, to excuse its failure to perform? One should: determine how circumstances changed from those existing at contract inception; analyze the terms of the force majeure clause, the other terms of the contract, and the broader transaction; and review applicable case law. One should also identify the location(s) of the breaching party's assets (including any collateral) and then determine the likelihood that enforcement of a judgment there would be successful.

But really, an ounce of prevention is worth a pound of cure. This reminder is timely: global politics appear to be moving away from a decades-long trend of cooperation towards greater balkanization driven by protectionism. If before this new era parties to cross-border transactions should have taken into account real world considerations when structuring their transactions, it is all the more important now.

Agreements should, of course, accurately reflect the deal between the parties to them. Parties would also be well-advised to: (1) adopt a dispassionate view of their agreements: they merely allocate the rights, obligations, and liabilities between the parties to set the stage for a discussion when circumstances change; (2) be confident in the choice of law or the venue for dispute resolution, but be more confident in their expectations regarding enforcement; and (3) structure transactions with an emphasis on practicality to give themselves meaningful levers permitting them to manage performance risk.

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